

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.

Application 05-02-027

**ADMINISTRATIVE LAW JUDGE'S RULING DENYING, IN PART,
APPLICANTS' MOTION TO STRIKE REPLY TESTIMONY OF
VARIOUS WITNESSES**

This ruling denies, in part, the motion filed on July 19, 2005 by the Joint Applicants for an order striking testimony. Applicants, by their motion, seeks to strike testimony submitted by: Arrival Communications (Arrival), the California Association of Competitive Telecommunications Companies (CALTEL), the Community Technology Foundation of California (CTFC), Cox California Telecom LLC (Cox), Level 3 Communications LLC (Level 3), the Office of Ratepayer Advocates (ORA), Pac-West, Telscape, The Utility Reform Network (TURN), and Qwest Communications Corporation (Qwest). By this ruling, the motion to strike is denied, with the exception of the portion of the motion relating to the testimony of Arrival. That portion of the motion will be addressed in a separate ruling.

Applicants move to strike the cited pieces of testimony based on the claim that they raise issues that are “wholly irrelevant” to the Application. Applicants argue that the testimony in question pertains to services or other matters beyond the Commission’s jurisdiction, offers recommendations having no bearing on the Application, but having broad implications for the industry as a whole, or that would encourage relitigation of matters previously resolved by this Commission or the FCC. Applicants attach Exhibit A to their motion, a matrix listing of the testimony requested to be stricken, together with a brief summary of Applicants’ argument in favor of striking it. Exhibit B to the motion contains the specific testimony sought to be stricken.

Position of Applicants

Applicants move to strike certain testimony as identified in their motion based on the claim that such testimony addresses issues and measures that exceed this Commission’s jurisdiction. For example, Applicants object to ORA witness Selwyn’s proposal for limiting prices for unbundled network elements, arguing that such a proposal conflicts with federal rules that have eliminated total element long-run incremental cost (TELRIC) pricing requirements for such network elements. Dr. Selwyn also recommends, as a condition of merger approval, that the Commission impose federal affiliate separation requirements that the FCC has agreed to sunset,¹ while acknowledging that such requirements will lapse “by operation of [federal] law.”² Applicants likewise object to

¹ Selwyn Testimony, p. 211; Attachment 6, p. A6-2.

² Selwyn Testimony, p. 210, n.189 (citing *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC 02-112, 17 FCC Rcd 26869 (2002)).

CALTEL witness Gillan's proposal for adoption of a new price cap regime for wholesale network elements, and Telscape witness Compton's proposal for a two-wire residential loop product priced at 50% below the TELRIC rate.

Applicants claim that Telescape's testimony is an impermissible collateral attack on the Commission's determination in D.04-12-053 that Telescape had failed to demonstrate widespread concern with the CLEC community about SBC's progress in improving its service order handling.

Applicants also object to witnesses' testimony proposing imposition of ILEC interconnection obligations relating to the Internet backbone and data services, and proposals to require stand-alone DSL service. Applicants also object to Level 3 witness Vidal's testimony to require SBC to exchange Voice over Internet Protocol (VOIP) traffic at local reciprocal compensation rates.

Applicants argue that such testimony crosses the line into federal jurisdiction, and that this Commission does not have the authority to approve the measures discussed in parties' testimony. Applicants claim that federal law precludes the imposition of ILEC interconnection obligations on competitive local exchange carriers (CLECs) and interexchange carriers (IXCs).³ Applicants argue that it would be wasteful to require continued litigation on these issues, and that such testimony should therefore be stricken from the record.

Response of Intervenors

Responses to the Motion to Strike were filed on July 22, 2005, by each of the parties whose testimony is the subject of the motion to strike (except for Arrival which sought leave for a late-filed response on July 25, 2005). Opposing

³ Compare 47 U.S.C. § 251(b) with 47 U.S.C. § 251(c).

parties uniformly oppose Applicants' motion, arguing that the subject testimony is within the scope of the proceeding, addresses important issues relating to the effects of the merger, and proposes mitigation measures that parties believe are required if the merger is to be approved consistent with the public interest.

Opposing parties deny that the subject testimony relates to matters beyond the jurisdiction of this Commission. They argue that the subject matter of the testimony is either directly within the jurisdiction of this Commission, or within the broad scope of the Commission's purview under Section 854 (b) and (c).

Parties argue that nothing in those statutory provisions limit Commission review to only regulated services.

Discussion

Applicants' motion to strike the above-referenced testimony is denied (except for the Arrival testimony to be addressed in a separate ruling).

Applicants have failed to show that the testimony in question raises matters beyond the scope of the proceeding and outside of this Commission's jurisdiction. Striking the testimony would prevent the Commission from developing a full record on whether the merger is in the public interest, and what conditions, if any, may be required to mitigate adverse impacts. Although the Applicants claim that the topics presented in intervenors' testimony have no bearing on the impact of the proposed change of control on the public, the competitive environment, or this Commission, a review of the testimony shows that it does bear on these issues.

In a number of instances, Applicants are in error in claiming that the issues in the testimony relate to services that are not regulated by this Commission. For example, the Pac-West witness proposes a mitigating condition relating to network facility interconnection obligations and rights, including both circuit-

switched and packet switched facilities. Yet, Applicants erroneously characterize the Pac-West proposal as relating to Internet and data services which are subject to federal regulation. The Commission can impose conditions relating to access to the network without regulating Internet services.

ORA witness Selwyn has proposed, as a condition of approval of the merger, that any purchaser of AT&T's consumer business be permitted to obtain access to the unbundled network switching elements or its equivalent at TELRIC rates from SBC. Although such pricing limits are no longer a requirement under federal rules, there is nothing to prohibit a party from proposing network element pricing limits as a mitigating condition for approval of the merger under Section 854 (b) and (c). Applicants are free to challenge the substantive merits of such a proposal through the course of litigation.

Level 3 has proposed, as a merger condition, that SBC be required to offer DSL service on a stand-alone basis. Applicants argue that because this Commission does not regulate DSL, such a proposal is beyond the scope of Commission jurisdiction. Yet, the Commission has jurisdiction to require, within its authority over wireline services, that if SBC intends to bundle DSL with regulated wireline services, that it also offer DSL on a stand-alone basis as a condition to approval of the merger.

As noted above, Applicants also move to strike Telescope testimony, claiming that it is a collateral attack on the Commission's determination in D.04-12-053 that Telescope failed to demonstrate widespread concern about SBC's progress in improving its service order handling. Yet, the Telescope testimony in this proceeding is addressing different circumstances than were before the Commission in D.04-12-053. In that decision, the Commission did not consider how a proposed acquisition of AT&T by SBC could affect the public

interest, or how the proposed measures that were rejected in D.04-12-053 may be relevant in the context of a mitigating condition of the proposed merger.

Moreover, even to the extent that certain mitigation measures may relate to matters that entail federal regulation, the authority granted to this Commission under Section 854 (b) and (c) is sufficiently broad to encompass testimony on such measures. The scope of this proceeding expressly incorporates the requirements of Section 854 (b) and (c). As prescribed in Section 854 (b) (3), as a basis for approving a merger, the Commission must consider whether the proposed transaction will adversely affect competition, as well as measures to mitigate adverse impacts. The statute does not limit the analysis only to specific services, or specific mitigating conditions. Accordingly, parties may propose mitigating conditions, including pricing restrictions, even though such conditions may be more restrictive than are currently in place under federal rules.

The Commission has previously confirmed its jurisdiction to consider competitive impacts and mitigating measures for a merger under Section 854(b), even where a federally regulated service is involved. For example, in D.91-05-028 involving the Southern California Edison Company (Edison) proposed merger with San Diego Gas & Electric Company, the applicants in that proceeding made a similar claim as Applicants do here. Edison argued that a federal regulatory agency (the Federal Energy Regulatory Commission, in that case) had jurisdiction over the transmission and sale of electric energy in interstate commerce, and that federal jurisdiction is plenary. As such, Edison claimed that states may not act in manner that would conflict with a federal determination. Since the federal agency had chosen to exercise authority to determine the competitive impacts of that merger on such federally regulated

services, Edison argued, this Commission's authority to review competitive impacts of a merger under Section 854 (b) must be viewed within the limits of state-regulated services which the federal agency did not regulate.

In D.91-05-028, however, the Commission rejected Edison's interpretation, stating that:

"This Commission's statutory authority to determine whether the proposed merger should be authorized, based upon the assessment of competitive impacts and their potential mitigation (§ 854(b)(2)) is meaningfully exercised only if this Commission is free to engage in the full extent of the merger's impacts on California ratepayers. The statute requires that we assess whether the merger will impact competition. If that assessment requires us to take into account certain issues regarding interstate transmission and bulk sales, then that is what we must do. Furthermore, as an administrative agency created by the Constitution, we have no power to refuse to enforce § 854(b)(2) on the basis of federal preemption, unless an appellate court has made a determination that enforcement of the statute is prohibited by federal law or federal regulation. (Cal. Const. Act. 3, § 3.5. (40 CPUC 2d, 159, 179.) (Emphasis added.)

The objections raised by the Joint Applicants are similar to those raised by Edison in the above-referenced proceeding. Although the Edison merger involved a different industry, the issue still involved the jurisdiction of this Commission to impose conditions on a merger that relate to federally regulated services. Consistent with the Commission's determinations, as cited above from D.91-05-028, the statutory mandates under § 854(b)(2) require consideration of the full extent of competitive impacts of the merger, including impacts on services and prices that may involve federal regulation.

Additionally, Joint Applicants cite no appellate court determination that the Commission's enforcement of § 854(b)(2) is prohibited by federal law or regulation. Thus, consistent with D.91-05-028 cited above, the Commission has

no power to refuse to enforce the statute based merely on Applicants' claims of federal preemption.

To the extent that the Commission may decide to impose mitigation measures, such action would only occur within the context as conditions to support a Commission finding that the merger was in the public interest pursuant to § 854. If the Applicants decided not to go forward with the merger, they would not be required to implement any of the mitigation measures. Thus, cast within that context, the testimony at issue is within the scope of the Commission's jurisdiction under § 854(b)(2), and does not call upon the Commission to exceed its jurisdictional authority.

The question of the substantive merits of such testimony is beyond the scope of this ruling, and should be addressed through the hearing process. It would be a violation of due process, however, simply to strike such testimony without opportunity to consider its substantive merits consistent with § 854(b). Thus, the motion to strike testimony as identified above is denied.

IT IS RULED that

1. Applicants' motion is denied, in part, to strike portions of the testimony of the California Association of Competitive Telecommunications Companies, the Community Technology Foundation of California, Cox, Level 3, the Office of Ratepayer Advocates, Pac-West, Telscape, The Utility Reform Network, and Qwest.

2. A separate ruling shall address the portion of Applicants' motion seeking to strike the July 8, 2005 testimony of Arrival witness Michael Mulkey.

Dated July 27, 2005, at San Francisco, California.

/s/ THOMAS R. PULSIFER

Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying, in Part, Applicants' Motion to Strike Reply Testimony of Various Witnesses on all parties of record in this proceeding or their attorneys of record.

Dated July 27, 2005, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.